Dynabil Industries, Inc. *and* International Association of Machinists and Aerospace Workers, District Lodge 725, AFL–CIO. Case 21–CA–32501

December 23, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On February 24, 1999, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dynabil Industries, Inc., El Cajon, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

David Mori, Esq., for the General Counsel.
Michael Curran, Esq. (Curran & Associates), of Carlsbad, California, for the Respondent.
Rod Weigand, of Ontario, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Diego, California, on November 19, 1998. On January 26, 1998, International Association of Machinists and Aerospace Workers, District Lodge 725, AFL–CIO (the Union) filed the charge alleging that Dynabil Industries, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On May 6, 1998, the Regional Director for Region 21 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Roger Varien because of his support for the Union or because of his other protected concerted activities. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation with a principal office located in Coxsackie, New York, and a branch office and facility in El Cajon, California, where it is engaged in the manufacture of aviation parts. During the 12-month period ending March 31, 1998, Respondent purchased and received at its El Cajon, California facility goods valued in excess of $50,000 directly from points outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Roger Varien began working for Respondent in June 1997. Varien worked as a fabricator in Respondent's trim shop. Varien normally worked a 4-day/10-hour workweek. Varien had formerly been a member of the Union and in November of 1997, he contacted the Union with the intention of organizing the employees at Respondent's El Cajon facility.

In late November 1997, Varien spoke to employees at the facility in an effort to obtain names and addresses of interested employees for the Union. During November and December, Varien obtained the names and addresses for approximately 80 employees which he gave to the Union.

During the fall and winter of 1997, Varien expressed his concerns about working conditions to Respondent's supervisors and managers. In weekly employee group meetings conducted by the Company, called "scrap reviews," it is undisputed that Varien was outspoken in questioning management about safety and working conditions. Respondent's supervisors admitted that they considered Varien's questions and comments as disparaging and antimanagement.

On January 15, 1998, Varien was scheduled to begin work at 6 a.m. Varien punched the timeclock at 5:40 a.m. and then approached a group of employees who also were scheduled to begin work at 6 a.m. These employees had prepared for work, punched the timeclock and had taken a break before starting work at 6 a.m. Varien asked the employees to sign a petition entitled "Authorization of Union Representation" on behalf of the Union. Varien obtained the signatures of six employees.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by the discharge of Roger Varien, Member Hurtgen relies on the judge's observation that the Respondent terminated Varien less than 3 hours after giving him a written warning and without evidence of further wrongdoing. Member Hurtgen does not find that the written warning violated the Act. However, the only intervening event between the warning and the discharge was a meeting of managers to discuss the Union's organizing drive.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Anabol (Al) Quinones, a supervisor in the logistics department, approached Varien and three or four other employees. Quinones asked if Varien wanted him to sign the paper. Quinones said that what Varien was doing was "illegal." Varien answered that he was on his own time and Quinones replied that Varien was on company property. Varien repeated that he was on his own time and Quinones stated, "[W]e will see about that" and walked away. Varien credibly testified that when Quinones walked away it was still only 5:55 a.m. Varien put the union petition away and went to work before 6 a.m.

Quinones testified that it was after 6 a.m. when he noticed Varien keeping a group of employees from working. He testified that he asked whether Varien was going to ask him to sign the paper. Quinones denied knowing that the paper was a petition for the Union. Quinones told Varien that what he was doing was "illegal." Quinones said Varien was wasting company time and other employees' time. Varien answered that he was not "on the clock." According to Quinones it was 6:03 a.m. and that he then checked Varien's timecard. The card showed that Varien had clocked in at 5:40 a.m. The company rules state that an employee should not clock in more than 10 minutes prior to the start of the shift. Quinones did not look at the timecard for any of the other employees involved in this incident. Quinones reported Varien's actions to Robert Barry, Respondent's work center manager. However, Quinones did not report the names of the other employees.

I credit Varien's version of these events over that offered by Quinones. First, Varien's testimony that these events took place prior to 6 a.m. was corroborated by two other credible witnesses. Further, Quinones denied knowing that the paper involved the Union but offered no credible explanation for using the word "illegal." Third, Quinones did not check the timecards of the other employees who by his own testimony were wasting company time.

As mentioned above, after speaking with Varien, Quinones walked to the timeclock and pulled Varien's timecard. He did not pull the timecard of any of the other employees allegedly wasting company time. Quinones reported to Barry that Varien was "getting people to sign something." Quinones told Barry that there were other employees with Varien but Quinones apparently did not mention the name of any other employee and Barry did not ask who else was involved. Barry did not check the timecards of any other employee.

On January 16, at approximately noon, Varien was called into Barry's office and given a written warning. In the presence of Michelle Parada from Respondent's human resources department, Barry handed Varien a written warning for :

> wasting company time and disrupting the workforce in the trim shop. In addition, employee punched in on his clock card earlier than he was directed. This policy is also in the Employee Handbook Section II.

The warning stated, "[N]ext disciplinary step proposed suspension and disciplinary action up to and including termination." Barry did not explain the warning but did give Varien a copy of his timecard showing that the employee had clocked in more than 10 minutes prior to the beginning of his shift and an excerpt from the employee handbook setting forth the rule. Varien contended that he was being singled out because other employees also punched in for work at the same time he did. He further offered to show Parada the timecards of other employees to prove his point but Parada declined to look at other timecards. After Parada refused to look at the timecards, Varien returned to work.

At approximately 3:30 p.m., Varien was called into the office of Manager Allen Ellsworth. Present were Ellsworth, Barry, Parada, and another employee from human resources. Ellsworth told Varien that "under Section 1089 of the Insurance Code," Varien was discharged and that Respondent did not have to give Varien any reason for the discharge. Ellsworth then handed Varien a termination notice. The termination notice contained the notation "refusal to accept available work effective 1/16/98" and what appear to be initials. Ellsworth could not explain this notation on the termination slip and no other representative of Respondent testified as to the meaning of this remark. There is no evidence or contention that Varien refused any work assignment. Further, there is no evidence that Varien engaged in any misconduct in the 2-1/2 hours between his warning and his discharge. Varien refused to sign the termination notice.

After receiving his termination notice, Varien left the building. However, he returned within 30 minutes to retrieve his jacket. While Varien was getting his jacket he received a copy of a memorandum issued that date to all employees regarding the Union. The memorandum stated, inter alia, "[I]t has come to our attention that possible attempts at union organizing may be occurring within our industry and certain union individuals may attempt to contact or recruit you." Respondent admits that this memorandum was distributed to employees on January 16, after Varien's discharge. Prior to the issuance of this memorandum, Respondent's manager, Lloyd Clark, had issued a memorandum to all managers and supervisors informing them that there was a "union blitz" aimed at the Company. At a meeting held prior to the issuance of the memorandum to all employees, Clark discussed union organizing with the managers and supervisors including those that terminated Varien. Although Respondent argues that this meeting took place after Varien was discharged, I find, based on the timing that Varien received the second memorandum only 30 minutes after his discharge, that the managers' meeting took place prior to Varien's discharge.

B. Respondent's Defenses

Respondent contends that "Varien was a below average employee who had a history of prior discipline for a variety of reason, primarily wasting time, talking when he should have been working, poor attitude and cheating the company's payroll system and was finally terminated as a result of habitually failing to follow [Respondent's] policies."

On October 1, 1997, Varien received his new employee evaluation from Barry. The overall rating indicated that Varien needed improvement. In the area of "attendance & punctuality," Barry rated Varien as exceeding job requirements. Regarding quality and quantity of work Barry graded Varien as meeting job requirements. As a result of the evaluation, Barry recommended that Varien be retained as an employee but that Varien not be given a pay increase.

Varien received a written warning from Barry on November 15, 1997. However, the warning itself indicates that it was Varien's first verbal warning. The reason listed for the warning was "waste of company time. Talking for extended periods of time on non related items on different occasions." Varien was advised to "pay attention to job duties." Varien disagreed with the warning and refused to sign it. On November 26, Varien

made comments during a scrap review meeting in which he mentioned safety concerns of employees in the facility. Quinones was offended by these comments and wrote a verbal warning for Varien's file. Quinones wrote as the reason for this warning, "Comments made during scrap review to lower morale. Putting down Dynabil and management." I do not credit Quinones testimony that Varien refused to sign the warning. Rather, I find in accordance with Varien's testimony that the warning was not shown to Varien. Quinones did, however, express his dissatisfaction with Varien's comments at the scrap review meeting with Varien.

As indicated above, on January 15, Quinones found Varien soliciting signatures on a union petition prior to starting work. Quinones, approached Varien and three or four other employees. Quinones asked if Varien wanted him to sign the petition. Quinones said that what Varien was doing was "illegal." Varien answered that he was on his own time and Quinones replied that Varien was on company property. Varien repeated that he was on his own time and Quinones stated, "[W]e will see about that," and walked away. Quinones pulled Varien's timecard but not the cards of the other employees. On January 16, Respondent gave Varien a written warning and then later discharged him that date. Although the warning stated that Varien was being disciplined for wasting company time, disrupting the workforce, and punching in early, Respondent would not give Varien any reason for the discharge. None of the other employees were disciplined.

Respondent had a rule directing employees not to clock in earlier than 10 minutes before their starting time or punch out later than 10 minutes after the end of their shift. The rule was contained in the employee handbook and was posted by Respondent after Varien's discharge. The purpose of the rule was to avoid the payment of overtime based simply on manipulation of the timeclock. Respondent contended that Varien received some overtime by virtue of clocking in early but no records were offered to support this argument.[2] Varien denied receiving such overtime payments.

Respondent argues that Ellsworth, Barry, and Quinones decided to terminate Varien prior to any knowledge of union activities. I give no credit to this argument. First, circumstantial evidence shows that Quinones found Varien passing out a petition for the Union on January 15. Second, Lloyd Clark, general manager, admitted that he was aware of union activities on January 15. On January 16, between Varien's warning and discharge, Respondent's management held a meeting to discuss the Union's organization and solicitation.

Finally, Respondent argues that this case is simply based on the Union's attempt to obtain reinstatement and backpay for Varien as an organizing tool. I find no merit in such an argument. The Union's leading adherent was given a written warning and terminated 1 day after being observed obtaining signatures for a union petition. The reasons given for the warning were suspicious and no reason was given for the discharge. Upon receiving such information from Varien, the Union filed the instant charge only 5 days after the discharge. No inference of an improper motive can be drawn from such circumstances. The case rises or falls on the facts of this case and the applicable law. The Union's motives in filing the charge for Varien are irrelevant.[3] Varien, as any other alleged discriminatee, stands to gain if the case is decided in his favor. That significant fact has been considered in making credibility determinations.[4] However, as managers of Respondent, Quinones, Ellsworth, and Barry also had pecuniary and other self-interests in denying any unfair labor practices. Based on demeanor and corroboration by other credible witnesses, I found Varien to be a credible witness and believe him to be a more reliable witness than Quinones, Ellsworth, and Barry.

C. Conclusions

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

Respondent argues that it had no knowledge of Varien's union activities but a strong circumstantial case proves otherwise. Knowledge need not be established directly, but may rest upon circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Montgomery Ward & Co.*, 316 NLRB 1248, 1254 (1995); *Greco & Haines, Inc*., 306 NLRB 634 (1992). Upon discovering Varien soliciting signatures, Quinones sarcastically asked whether Varien was going to request Quinones to sign. Quinones told Varien that such activity was "illegal." The use of that term only makes sense in the context that Quinones believed that Varien could not solicit for the Union on company property. Quinones then checked the timecard of Varien but not the other employees involved. If all were wasting time, Quinones would have acted against all of the employees. This selective action indicates that Quinones believed Varien was the only one doing something illegal; engaging in union activities on company time and property. Clark, Respondent's manager, admitted that he learned of general union activity during the morning of January 15.

For the following reasons, I find that General Counsel has made a strong prima facie showing that Respondent was motivated by unlawful considerations in discharging Varien. First, the timing of the warning and discharge, shortly after Quinones found Varien soliciting signatures for the union petition, sug-

[2] Respondent also argued that other employees had been disciplined for violating this rule but no such evidence was offered.

[3] Respondent argues that the union representative was not a credible witness. However, except for Respondent's attempt to show an improper motive for filing the charge, the union representative did not testify to any relevant facts. The findings of fact in this decision are not based on any testimony of the union representative.

[4] See, e.g., *Hi-Craft Clothing Co*., 251 NLRB 1310, 1320 (1980), enf. denied on other grounds 660 F.2d 910 (3d Cir. 1981).

gests union animus as a motivating factor in Respondent's decision. The abruptness of the discharge and its timing are persuasive evidence as to Respondent's motive.

Second, Respondent took disciplinary action against Varien but did not investigate or take disciplinary action against the other employees. Blatant disparity is sufficient to support a prima facie case of discrimination. *Fluor Daniel, Inc.*, 304 NLRB 970, 970–971 (1991). According to Quinones' version of these events, all the employees were wasting company time. However, Quinones only checked Varien's timecard and did not report the name of any other employee to Barry. The rule prohibiting clocking in early wasn't posted by Respondent until after Varien's discharge. Third, after giving Varien a written warning, Respondent terminated Varien less than 3 hours later without any further wrongdoing. The only intervening event was a meeting of managers to discuss the union organizing drive. Respondent offered no credible reason for its haste in discharging Varien after just giving him a written warning. Fourth, Respondent refused to give Varien a reason for the discharge. The refusal to give a reason for the discharge under these circumstances raises an inference that Respondent had an unlawful motivation for the discharge. *Bentley Hedges Travel Service*, 263 NLRB 1408 (1982). Finally, Respondent wrote on the discharge slip that Varien had refused an assignment. This false reason also buttress the conclusion that Respondent was attempting to conceal its unlawful reasons for the discharge.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Varien's union activities. Respondent has not met its burden under *Wright Line*. Its assertion that Varien was an average or below average employee is not sufficient to overcome the prima facie case. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the evidence." *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.,* 271 NLRB 443 (1984). Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

Moreover, the evidence that Varien clocked in early and wasted company time is not persuasive in light of Respondent's failure to investigate or discipline the other employees. Respondent contended that other employees had been disciplined for similar offenses but offered no such evidence.

I find that the strong prima facie case is not rebutted by the evidence that lawful reasons for lesser discipline may have existed. Respondent must show that Varien would have been discharged in the absence of his union and protected concerted activities. This Respondent has been unable to do. Accordingly, I find that the termination of Varien was motivated by the employee's protected union activities and that Respondent has not established that it would have discharged Varien absent that protected conduct. Thus, I find that Respondent has failed to carry its burden under *Wright Line* and that the discharge of Roger Varien violated Section 8(a)(3) and (1) of the Act. See *Bronco Wine Co.*, 253 NLRB 53 (1981); and *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By issuing a warning to and discharging Roger Varien because of his activities on behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.
4. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent offer Roger Varien full and immediate reinstatement to the position he would have held, but for his unlawful discharge. Further, Respondent shall be directed to make Varien whole for any and all loss of earnings and other rights, benefits, and privileges of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to remove any and all references to its unlawful warning and discharge of Varien from its files and notify Varien in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Dynabil Industries, Inc., its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings to and discharging employees in order to discourage union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer reinstatement to Roger Varien to the position he would have held, but for his unlawful discharge.

(b) Make whole Varien for any and all losses incurred as a result of Respondent's unlawful discharge of him, with interest, as provided in the remedy section of this decision.

[5] All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the warning and discharge of Varien and notify him in writing that this has been done and that Respondent's discipline of him will not be used against him in any future personnel actions.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its El Cajon, California facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since January 15, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue warnings to or discharge employees in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Roger Varien to the position he would have held, but for his unlawful discharge.

WE WILL make whole Roger Varien for any and all losses incurred as a result of our unlawful discharge of him, with interest.

WE WILL expunge from our files any and all references to the unlawful warning and discharge of Roger Varien and notify him in writing that this has been done and that the fact of this unlawful discipline will not be used against him in any future personnel actions.

DYNABIL INDUSTRIES, INC.